IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. [redacted] 29

WILLIAM B. CAMMARANO and LOUISE CAMMARANO,
His Wife, *Petitioners,*

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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WILLIAM B. CAMMARANO and LOUISE CAMMARANO, your petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on July 8, 1957.

OPINIONS BELOW

The oral opinion of the district court (R. 27-30) is not reported. The opinion of the court of appeals (Appendix A, pp. A1-A6, *infra*) is reported at 246 F. 2d 751.

JURISDICTION

The judgment of the court of appeals (Appendix B, p. A7, *infra*) was entered on July 8, 1957. A timely petition for rehearing and for rehearing en banc was denied on October 15, 1957 (Appendix C, p. A8, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, where taxpayers make payments to a publicity program designed to defeat an initiative measure submitted to the voters at large, which measure would have destroyed the taxpayers' business, the Commissioner of Internal Revenue may by regulation disallow such payments as business expenses in the face of a statute permitting deductions of "All ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business."

2. Whether a regulation forbidding deduction of expenditures for "the promotion or defeat of legislation" may properly be construed and applied to bar deduction of expenditures made to defeat an initiative measure submitted to the people at large.

3. Whether, where the uncontroverted evidence, as well as facts within judicial notice, show that an initiative measure aimed at closing all privately-owned establishments selling beer and wine at retail would destroy 90% of all wholesale businesses in those commodities, it was open to the district court to find (or for the court of appeals to base its additional affirmance on the ground) that it was not shown that the forced closing of retail stores would affect wholesale business.

STATUTE, REGULATION, AND STATE CONSTITUTIONAL PROVISION INVOLVED

The statute, regulation, and state constitutional provision involved are set forth in Appendix D, pp. A9-A12, *infra*.

STATEMENT

Petitioners, husband and wife (Fdg. 1, R. 44), owned a one-fourth interest in a partnership carrying on wholesale distribution of beer under the trade name of "Cammarano Brothers" in Tacoma, Washington (Fdg. 4, R. 45).

At the Washington State general election held on November 2, 1948, an initiative measure was submitted to the people in accordance with Amendment 7 to the Constitution of the State of Washington (Appendix D, pp. A11-A12, *infra*). That Initiative to the Legislative, No. 13, would have placed the retail sale of wine and beer exclusively in state-owned and operated stores.

The ballot title of Initiative No. 13 provided:

> "An Act prohibiting the retail sale of beer and wine by any person other than the State of Washington, repealing all provisions of existing law pertaining to licensing of retail sale of beer and wine, revoking existing licenses and providing penalties." (Fdg. 6, R. 45.)[1]

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[1] The ballot title, under Washington law, was formulated by the Attorney General of the State. Wash. Rev. Code, §§ 29.79.040, 29.79.060. The full text of the initiative measure appears at R. 93-96. Under Washington law, arguments for and against an initiative measure are, after formulation by its proponents and opponents, distributed by the Secretary of State at public expenses. See Wash. Rev. Code, §§ 29.79.340 to 29.79.430. The text of the arguments for and against Initiative No. 13 are set forth at R. 96-101.

The measure had previously, in 1947, been submitted to the state legislature, which did not act upon it (Fdg. 7, R. 45-46). Thereupon the Initiative was submitted to the people in 1948, in which year the legislature was not in session (Pretrial order, ¶ 6, R. 22).

Petitioners were members of the Washington Beer Wholesalers Association, Inc. (Fdg. 5, R. 45), a non-profit trade association exempt from federal income tax (Fdg. 10, R. 47; Pretrial order, ¶ 6, R. 22). This Association in December 1947 established the Washington Beer Wholesalers Association, Inc. Trust Fund, to help finance an extensive statewide publicity program, on the part of wholesale and retail beer and wine dealers, which urged the defeat of Initiative No. 13 (Fdgs. 5-6, R. 45).

Payments to the Trust Fund were made by the Association's members on the basis of the volume of business of each wholesaler (Fdg. 8, R. 46). During 1948, the partnership of Cammarano Brothers paid $3,545.15 to the Trust Fund, of which petitioners' proportionate share was $886.29 (Fdg. 5, R. 46).

The Trust Fund was expended in furtherance of the publicity program against Initiative No. 13 (R. 114-116), which was carried out by various types of advertising—newspaper, radio, direct mail, billboards, street-car cards (R. 115-116)—none of which had reference to the wares or members of the Association as such (Fdg. 8, R. 46).

Initiative No. 13 was defeated (Fdg. 9, R. 46).

In filing their joint federal income tax return for the year 1948, petitioners deducted as a business expense under Sec. 23(a)(1)(A) of the Internal Revenue Code

of 1939 as amended (Appendix D, p. A9, *infra*), their proportionate part of the payment made by the partnership to the Trust Fund in the campaign against Initiative No. 13 (Cmplt., ¶ V, R. 4; Exh. A. to Cmplt., R. 11-12; Ans., ¶¶ 5, 7, R. 13-14, 14-15).

The Commissioner disallowed the expenditures in question on the ground that Treas. Reg. 111, Sec. 29.23 (o)—1 (Appendix D, pp. A9-A11, *infra*) barred deductions of "Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda" (Cmplt., ¶ VI at R. 5-6; Ans., ¶ 6, R. 14; Pretrial Order, ¶ 5, R. 22), and assessed an additional tax against petitioners, of which the sum of $153.98 was attributable to such disallowance (Pretrial Order, ¶ 5 at R. 22).

After payment under protest of the additional tax assessed, and failure of the Commissioner to act upon petitioners' timely claim for refund, they brought the present action for the recovery of the tax so paid under protest (Fdg. 3, R. 44).

On the day of the trial, the Government filed a trial memorandum with the district court which stated, *inter alia* (R. 18), "Concededly, Initiative 13 would have affected a portion of plaintiffs' business, and perhaps would have put them out of business entirely." Government counsel in his opening statement sought to qualify or withdraw this concession (R. 73-74).

The only evidence on the point was offered by Adwen, Secretary of the Washington Beer Wholesalers Association (R. 75), who testified (R. 76-77):

> "A. Initiative 13 primarily would have in the opinion of the industry—I think I can safely say industry—would have made it necessary to dis-

> tribute beer and wine through state liquor stores which would have automatically put the taverns and the grocery stores handling beer and wine out of business. At the same time it would undoubtedly have put at least 90 per cent of the beer wholesalers out of business. I don't say a 100 per cent for this reason. It would still probably be necessary for some of the breweries to have representatives to call upon the Liquor Board to sell their merchandise and their wares, but at least 90 per cent of them would have had nothing to do so they would have gone completely out of business."

Although this was the only evidence on the point, the trial court found as a fact that (Fdg. 9, R. 46):

> "There was testimony to the effect that the Initiative, if passed, would have affected the wholesale business of Cammarano Brothers. However, the way in which the measure, aimed as it was at retail sales of wine and beer, would have affected the wholesale distribution of beer was not made clear."

The district judge, both in his oral opinion rendered at the close of the trial (R. 27-30) and in his formal conclusions of law filed four months later (R. 47-48), held for the Government on the ground that the regulation relied upon was valid and that there was no distinction between efforts to influence legislation that were addressed to the legislature and efforts directly addressed to the people in connection with an initiative measure.

After judgment for the defendant (R. 49-50), petitioners appealed to the court below (R. 51). That court held (Appendix A, pp. A1-A6, *infra*) that the regulation disallowing the expenditure was proper, and affirmed; and rested its affirmance on the addi-

tional ground (p. A6, *infra*) that, in view of Finding 9, quoted above, petitioners failed to establish "that passage of the initiative would have impaired its business as a beer distributor." A timely petition for rehearing was denied (Appendix C, p. A8, *infra*).

REASONS FOR GRANTING THE WRIT

The basic question presented is whether expenditures made by individual taxpayers to preserve their business from destruction, expenditures that on their face are ordinary and necessary business expenses, can be disallowed under cover of a regulation which, as here applied, is plainly at variance with the governing statute.

That basic question depends, in the present case, on whether a regulation disallowing expenditures incurred in lobbying or in attempting to defeat legislation in the ordinary sense of that word, i.e., enactments of representative bodies, may properly be construed to apply to expenditures made in connection with an initiative measure submitted directly to the voters at large, whose enactment or defeat is not dependent on any action by a legislative body.

First. Under a long line of cases, here and elsewhere, it is settled that a taxpayer may deduct, as an ordinary and necessary business expense within the meaning of those words in Sec. 23(a)(1)(A), sums expended by him to preserve his business or occupation from destruction. Thus, a mail order dentist threatened with a postal fraud order has the right to deduct expenses incurred in defending the postal proceedings (*Commissioner* v. *Heininger,* 320 U.S. 467); an officer facing a court-martial and the consequent risk of dismissal from the service may deduct counsel fees in-

curred in defending against the charges, since, of course, his business is that of being an officer (*Lindsay C. Howard,* 16 T.C. 157, affirmed on another issue, 202 F. 2d 28 (C.A. 9)); and a motion picture scenario writer, summoned to appear before a Congressional committee and facing possible blacklisting by the industry, may deduct the sums paid counsel for representing him with a view to preventing his loss of livelihood (*Waldo Salt,* 18 T.C. 182). On this principle, the deduction here should have been allowed. As Judge Minton said in the *Heininger* case below (*Heininger* v. *Commissioner of Internal Revenue,* 133 F. 2d 567, 570 (C.A. 7)), quoted with approval in *Lilly* v. *Commissioner,* 343 U.S. 90, 94, note 4,

> "Without this expense, there would have been no business. Without the business, there would have been no income. Without the income there would have been no tax. To say that this expense is not ordinary and necessary is to say that that which gives life is not ordinary and necessary."

That being so, any regulation which attempts to disallow the deduction plainly granted by the statute is necessarily invalid. E.g., *Bingham's Trust* v. *Commissioner,* 325 U.S. 365, 377, and cases there cited.

2. Passing for the moment the distinction between lobbying in legislative halls, with all its sordid connotations of insidious influences, and attempts such as the one here involved, "to saturate the thinking of the community" (*United States* v. *Rumely,* 345 U.S. 41, 47)—a vital difference which is fully discussed immediately below—it is significant that petitioners' expenses were incurred to save their existing business from destruction and not merely in an attempt to create a new business in the future. The latter may be assumed

to be non-deductible by analogy to the rule of *McDonald* v. *Commissioner*, 323 U.S. 57, 60—"his campaign contributions were not expenses incurred in being a judge but in trying to be a judge for the next ten years." It is on that basis that most instances of expenses incurred in direct appeals to the electorate in the endeavor to legalize a future business presently illegal have been disallowed. E.g., *Mrs. William P. Kyne*, 35 B.T.A. 202 (horse racing); cf. *Mays* v. *Bowers*, 201 F. 2d 401 (C.A. 4) (to be elected a city councilman); cf. *Old Mission P. Cement Co.* v. *Commissioner of Int. Rev.*, 69 F. 2d 676 (C.A. 9), affirmed on other issues, 293 U.S. 289 (effect of referendum measure on business held too remote). But petitioners here did not appeal to the voters to gain office prospectively or to be permitted to engage in a business then unlawful; they made expenditures in an ultimately successful effort to preserve from certain destruction an existing business then and now entirely lawful.

3. The basic distinction here is between lobbying, i.e., the exertion of pressures and persuasion on individual legislators, the attempt "to spread * * * insidious influences through legislative halls" that is within the condemnation of *Textile Mills Corp.* v. *Commissioner*, 314 U.S. 326, 338, and the wholly different effort "to saturate the thinking of the community" (*United States* v. *Rumely*, 345 U.S. 41, 47), which is an activity directed at the entire body politic.

Not only has this Court indicated that the *Textile Mills* case rests on the limited concept of lobbying, because that activity tends to frustrate settled public policies (see *Lilly* v. *Commissioner*, 343 U.S. 90, 95; *Commissioner* v. *Heininger*, 320 U.S. 467, 473), but the Commissioner of Internal Revenue himself, three

years after the *Textile Mills* decision, acquiesced in a Tax Court ruling which turned on the distinction between influence directed at legislators and publicity addressed to the entire electorate.

In *Luther Ely Smith*, 3 T.C. 696, the question concerned the right of the taxpayer, a trial lawyer, to deduct as an ordinary and necessary business expense a contribution made to an organization formed to amend the Constitution of Missouri by providing that candidates for judicial office should be nominated by a commission. The taxpayer established that his trial practice had suffered under the existing method of selecting judges because his clients had lost confidence in the courts. The contribution was expended for publicity in support of the amendment in the form of speeches, literature, and radio broadcasts. The amendment was adopted, and, being self-operative, became law forthwith.

In allowing the deduction, the Tax Court rested its conclusion on the basis that no lobbying was involved because the people themselves acted. It said (3 T.C. at 702):

> "It should be noted that the institute engaged in no lobbying of any kind before any legislative body. No legislation was needed or involved in its plan. It contemplated an amendment to the constitution proposed by the initiative of the people, voted upon at a general election, and becoming self-operative thirty days thereafter, without the necessity of any action or approval by either the legislature or the governor."

The Commissioner acquiesced, 1944 Cum. Bull. 26, and his acquiescence has never been withdrawn. We think there can be no sound distinction between a cam-

paign directed at the voters generally in respect of a constitutional amendment that takes effect without action of the legislature, and an initiative measure that similarly takes effect. Both are equally direct legislation enacted by the people in the exercise of their underlying sovereignty.

4. The view of both courts in this case, in substance that "legislation is legislation" (R. 29; Appendix A, pp. A3-A5, *infra*), not only disregards the evils inherent in lobbying, but overlooks completely an important and highly significant phase of American political development which had its origin in popular distrust of legislative bodies, and which sought the solution in a restoration of the people's sovereignty in the form of direct legislation by the people effectuated through the initiative and referendum. Amendment 7 to the Washington Constitution (Appendix D, *infra*, pp. A11-A12) was adopted in 1912, when the drive for such direct legislation was at its height. See, e.g., *The Initiative, Referendum, and Recall* (43 Annals of the American Academy, No. 132);[2] Theodore Roosevelt, *A Charter of Democracy* [Columbus, Ohio, speech, Feb. 21, 1912], Sen. Doc. 348, 62d cong., 2d sess., pp. 11-12;[3] Eaton,

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[2] "Briefly summarized, the functions of the initiative and referendum are: To restore the sovereignty of the people. To educate and develop the people. To secure legislation for the general welfare. To prevent legislation against the general welfare. To eliminate the legislative blackmailer. To make our legislative bodies truly representative." Sen. Bourne of Oregon, *Functions of the Initiative, Referendum, and Recall, id.* at 3.

[3] "We hold it a prime duty of the people to free our Government from the control of money in politics. For this purpose we advocate not as ends in themselves, but as weapons in the hands of the people, all governmental devices which would make the representatives of the people more easily and certainly responsible to the people's will." *Id.*, p. 3.

The Oregon System (1912); Beard and Schultz, *Documents on the State-Wide Initiative, Referendum and Recall* (1912); cf. *Pacific States Tel. & Tel. Co.* v. *Oregon*, 223 U.S. 118.

To hold, as did the courts below, that activities directed at legislation pending in legislative halls—the process of lobbying—are to be assimilated to activities directed at a measure presented to the people at large under initiative provisions adopted in the conscious effort to free the people from the frailties of their representatives, precludes the attainment of the very objectives of the initiative. And to hold that sums expended to oppose an initiative measure, which would have destroyed petitioners' business, are not ordinary and necessary business expenses, is to do violence not only to the language of the governing statute but also to "the ways of conduct and the forms of speech prevailing in the business world." *Commissioner* v. *Heininger*, 320 U.S. 467, 472.

Second. The view of the court below (Appendix A, p. A5, *infra*), that there has been Congressional reenactment of the regulation in question, will not survive examination.

To begin with, as this Court has frequently recognized, the doctrine of reenactment is a weak and unreliable reed on which to rest statutory interpretation. E.g., *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 431; *Jones* v. *Liberty Glass Co.*, 332 U.S. 524, 533-534; *Louisville & N. R. Co.* v. *United States*, 282 U.S. 740, 757, 759. But as applied to the present case, that doctrine is even weaker, to the point of disappearance.

For it requires, as a prerequisite, "regulations and interpretations long continued without substantial

change" (*Helvering* v. *Winmill*, 305 U.S. 79, 83), a condition that is lacking here. At best, all that can be shown is a regulation aimed at lobbying, at the influencing of legislation in its usual sense, i.e., enactments of representative bodies, a regulation which in its inception was aimed at expenditures by corporations and by corporations alone. See *Textile Mills Corp.* v. *Commissioner*, 314 U.S. 326, 337-338. There has never been any regulation specifically mentioning efforts to influence initiative measures submitted directly to the people. And, far from there being "interpretations long continued without substantial change" holding that "legislation" in the regulation includes measures enacted by direct vote of the people, the Commissioner asquiesced in the holding (*Luther Ely Smith*, 3 T.C. 696) that a taxpayer may deduct as a business expense expenditures incurred to adopt a constitutional amendment—direct legislation by the people—which he believed would increase his business.

Only two rulings have been found where it was held that expenses incurred in connection with a referendum for the continuance or non-continuance of a business dependent on periodic popular approval were nondeductible. *Revere Racing Association* v. *Scanlon*, 232 F. 2d 816 (C.A. 1, 1956) (dog racing); *Herbert Davis*, 26 T.C. 49 (1956) (liquor business). But in view of this Court's observation (*Jones* v. *Liberty Glass Co.*, 332 U.S. 524, 534)—"We do not expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation"—those rulings are plainly insufficient to permit invocation of the doctrine of reenactment, the more so since both followed by many years the basic statute on which petitioners here rest their case.

Any talk of "reenactment" in the present connection, therefore, must be dismissed as sheerest fiction.

Third. The alternative ground of affirmance espoused by the court below (Appendix A, p. A6, *infra*), to the effect that petitioners failed to prove that the passage of the initiative measure here in question would have impaired their business, is similarly untenable.

The only evidence on the effect of the initiative was that of the witness Adwen (R. 76-77), as follows:

> "* * * it would undoubtedly have put at least 90 per cent of the beer wholesalers out of business. * * * at least 90 per cent of them would have had nothing to do so they would have gone completely out of business."

A wholesaler sells to retailers. He can lose his business in one of two ways, either by having his own establishment closed or by having his customers' establishments closed. Either act effectively terminates his business. Plainly, when retail stores are closed, wholesalers have lost their trade for want of customers, and in this instance, 90% of the wholesalers would have had nothing to do. (No point is made, quite properly, that these petitioners did not undertake to demonstrate to a mathematical certainty that they would have come within the 90%.)

All the above is a part of "the general customs and usages of merchants" (*Brown* v. *Piper*, 91 U.S. 37, 42) and thus comes easily within the realm of judicial notice; and all the above is certainly as obvious as the fact that a freezer which makes ice cream is adapted to freeze fish (*Brown* v. *Piper, supra*). Indeed, the alternative holding of the court below fairly supports Ben-

tham's apothegm that jurisprudence is the art of being methodically ignorant of what everyone knows.[4]

Fourth. The present problem is a recurring one, and will continue to arise; Section 162(a) of the Internal Revenue Code of 1954[5] is the same as Section 23(a)(1)(A) of the 1939 Code, here involved. The present problem is important, for obvious reasons, since it poses sharply the question whether the taint of lobbying may properly be applied to what are after all petitions to the people themselves.

The English House of Lords, a tribunal not unmindful either of the demands of the fisc nor of considerations of public morality, has held that a corporation resisting nationalization and campaigning against such a course on the part of Parliament may deduct expenditures incurred in that behalf as "disbursements or expenses * * * wholly and exclusively laid out or expended

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[4] Finding 9 of the trial court (R. 46), which was relied on to support the alternative holding below (p. A6, *infra*), is also deficient on technical grounds: (a) In view of the Adwen testimony, that finding is "clearly erroneous" within Rule 52(b), F. R. Civ. P., under the standard of *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395. (b) The judicial admission in the Government's trial memorandum (R. 18), that "Initiative 13 would have affected a portion of plaintiffs' business, and perhaps would have put them out of business entirely," cannot be fudged (R. 73-74) in the absence of a showing that it could not in any circumstances be true. See *L. P. Larson, Jr., Co.* v. *Wm. Wrigley Jr., Co.*, 253 Fed. 914, 917-918 (C. A. 7), certiorari denied, 248 U.S. 580; *Oscanyan* v. *Arms Co.*, 103 U.S. 261, 263-264; 9 Wigmore, *Evidence* (3d ed. 1940) §§ 2588, 2590, 2591. No such showing, it need hardly be said, can be made.

[5] The text of the 1954 provision is as follows:

"**§ 162. Trade or business expenses**

"**(a) In general.**—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—* * *."

for the purposes of the trade." *Morgan* v. *Tate & Lyle, Ld.*, [1955] A. C. 21, affirming [1953] Ch. 601.[6]

We submit that review by this Court should be had before individual taxpayers are forbidden, on the footing of the now discredited notion (*United States* v. *Rumely*, 345 U.S. 41) that there is no difference between lobbying aimed at individual legislators and an appeal directed to the people at large, to deduct as business expenses the cost of saving their business from extinction.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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JANUARY, 1958

[6] If it be objected that the cited case did not involve any regulation against lobbying as this one does, the answer is that petitioners rely on substantially similar statutory language and urge that it could not be varied by the regulation here put forward by the Government.